HONG LEONG BANK BHD

v.

KOTA PELITA SDN BHD; AESBI POWER SYSTEMS SDN BHD (INTERVENER)

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[ORIGINATING SUMMONS NO: 24-989-2001(3)]
27 FEBRUARY 2009

LAND LAW: *Charge - Order for sale - Setting aside - Application for - Whether properly served at defendant's registered address - Intervener a purchaser in good faith - Whether intervener's title over land indefeasible - National Land Code, ss. 259(3), 340(3)*

This was the defendant's application in encl. 70 which in essence was aimed at securing an order to set aside an order for sale. Briefly, a charge was created on a property ('the land') by the defendant in favour of the plaintiff as security for repayment of banking facilities granted by the plaintiff to Zoomlink Holdings Sdn Bhd ('Zoomlink') Zoomlink subsequently defaulted on its repayment on the banking facilities. As a result, the plaintiff's solicitors issued a notice of demand to the defendant, as charger, to demand for payment of monies owned by Zoomlink, failing which the plaintiff would apply for an order for sale under the charge. The plaintiff served a Form 16D on the defendant at two addresses, including at suite 11.2B. On 16 April 2001, the defendant lodged a Form 44 to charge its registered address from Suite 11.2B to No. 61-B. Then thereafter the plaintiff filed the originating summons in this action to apply for an order for sale of the land (OS) on 9 May 2001. After that, on 30 July 2001, the OS and its supporting affidavit were served on the defendant at Suite 11.2B. It was acknowledged receipt by Securities Services (Holdings) Sdn Bhd. Subsequently, on 3 October 2003, the court granted an order for sale on the land to the plaintiff. On 26 April 2005, the land was sold by public auction to the intervener at RM7.5 million. Thereafter on 29 September 2005 the land was registered in the name of the intervener. On 4 July 2006, the defendant filed an application to set aside the order for sale and it was premised on one ground, namely, the OS and its supporting affidavit were not served on the defendant's proper registered address.

Held (dismissing defendant's application):

(1) When the OS was served on 30 July 2001, the defendant had already changed its registered address through lodgment of a form 44 with the Companies Commission of Malaysia. The defendant's registered address was changed from Suite 11.2B to No. 61-B. However, applying the principle of law as laid down by the Court of Appeal in *Puspavathy* to the case at hand, pursuant to O. 2 r. 1 of the Rules of the High Court 1980, the plaintiff's failure to serve the OS in accordance with the RHC was an irregularity but did not nullify the proceedings. (paras 3, 4 & 6)

(2) The title to the land had already been registered in the intervener's name. The intervener was the successful bidder of the land during the auction and had fully settled the purchase price and a form 16F had been issued to the intervener pursuant to s. 259(3) of the National Land Code. The intervener was a purchaser in good faith. In such circumstances, the intervener's title over the land was therefore indefeasible under s. 340(3) of the NLC. (para 7)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

Muniandy Tamba Kaundan v. D & C Bank Bhd [1966] 1 MLJ 374 ***(refd)***

Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors & Other Appeals [2008] 6 CLJ 626 CA ***(foll)***

Legislation referred to:

Local Government Act 1976 , ss. 146, 148, 151
National Land Code, ss. 259(3), 340(3)
Rules of the High Court 1980, O. 2 r. 1

For the plaintiff - Andrew Chiew; M/s Lee Hishamuddin Allen & Gledhill
For the defendant - Mahinder Singh; M/s Mahinder Singh Dulku & Co
For the interveners - Leng Boon Thai; M/s Leng & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed J:

[1] This is the defendant's application in encl. 70 which in essence is aimed at securing an order to set aside an order for sale dated 3 October 2003.

[2] The brief background facts, which resulted in the present application, are straightforward. On 4 October 1995 a charge was created on a property known as Grant No: 25342, Lot No 3786, Mukim Tebrau, Daerah Johore Bahru (the land) by the defendant in favour of the plaintiff as security for repayment of banking facilities granted by the plaintiff to Zoomlink Holdings Sdn Bhd (Zoomlink). Zoomlink subsequently defaulted on its repayment of the banking facilities. Despite repeated demands, it failed to settle the outstanding banking facilities. As a result on 7 February 2001 the plaintiff's solicitors issued a notice of demand to the defendant, as chargor, to demand for payment of monies owned by Zoomlink, failing which the plaintiff will apply for an order for sale under the charge. A search by the plaintiff on 8 February 2001 showed that the defendant's registered address was at Suite 11.3B, Level 11, Menara Pelangi, No 2, Jalan Kuning Taman Pelangi, 80400 Johore Bahru (Suite 11.2B).

[3] On 14 March 2001 the plaintiff served a Form 16D on the defendant at 2 addresses including at Suite 11.2B. On 16 April 2001 the defendant lodged a Form 44 to change its registered address from Suite 11.2B to No 61-B, Jalan Perang, Taman Pelangi, 80400 Johore Bahru (No 61-B). Then thereafter the plaintiff filed the Originating Summons in this action to apply for an order for sale of the land (the OS) on 9 May 2001. After that, on 30 July 2001 the OS and its supporting affidavit were served on the defendant at Suite 11.2B. It was acknowledged receipt by Securities Services (Holdings) Sdn Bhd. Subsequently, on 3 October 2003 the court granted an order for sale on the land to the plaintiff. On 26 April 2005 the land was sold by public auction to the intervener at RM7.5 million. The plaintiffs solicitors wrote to inform the defendant about the sale on 6 May 2005. Thereafter, on 20 June 2005 the intervener paid the full balance purchase price and on 29 August 2005 the intervener obtained Form 16F from the court. Next, on 29 September 2005 something

very important happened; the land was registered in the name of the intervener. On 4 July 2006 the defendant filed an application to set aside the order for sale and it is premised on one and only ground, namely the OS and its supporting affidavit were not served on the defendant's proper registered address.

[4] There can be no dispute that when the OS was served on 30 July 2001, the defendant had already changed its registered address through lodgment of a form 44 with the Companies Commission of Malaysia on 16 April 2001. The defendant's registered address was changed from Suite 11.2B to No. 61-B. What is the effect? It is the submission of learned counsel for the defendant that in the circumstances there was no proper or valid service of the OS on the defendant and the order for sale dated 3 October 2003 was and is a nullity arid that it should be set aside *ex debito justitiae*. He relied on *Muniandy Tamba Kaundan v. D&C Bank Bhd* [1966] 1 MLJ 374 and *M& J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14 to support his argument that the order for sale should be set aside.

[5] On the other hand, learned counsel for the plaintiff has drawn to my attention to the recent Court of Appeal decision in *Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors & Other Appeals* [2008] 6 CLJ 626. There, the 8th defendant was one of eight proprietors of a parcel of land in Telok Pulai, Klang ('the said land') who failed to pay the assessment rate amounting to RM21.887 which led the plaintiff to apply for an order for sale of the said land pursuant to ss. 146, 148 and 151 of the Local Government Act 1976 ('LGA 1976'). The High Court granted the order for sale and the said land was sold by way of public auction to the 2nd Intervener who was duly registered as the registered proprietor of the said land.

The 2nd intervener subsequently charged the said land to OCBC Bank (Malaysia) Berhad, the 1st intervener, registered as chargee of the said land. Subsequently, the 8th defendant applied to set aside the order for sale alleging that it was a nullity since the originating summons was not served on her. The 1st and 2nd intervenes were allowed to intervene in the application by the 8th defendant. The High Court judge allowed the 8th defendant's application but only to the extent of her share in the said land. The following issue, *inter alia*, arose for determination in the Court of Appeal: whether the non-service of the summons amounted to

a mere irregularity or a nullity. The Court of Appeal held that the plaintiff's failure to comply with the Rules of the High Court (the RHC) merely rendered the order for sale obtained irregular and not a nullity.

[6] Applying the principle of law as laid down by the Court of Appeal in *Puspavathy* to the case at hand, it is my view that pursuant to O. 2 r. 1 of the said RHC the plaintiff's failure to serve the OS in accordance with the RHC is an irregularity and shall not nullify the proceedings.

[7] And on top of all this, a very important fact that requires to be kept in mind is that the title to the land has already been registered in the interveners's name. The intervener was the successful bidder of the land during the auction on 26 April 2005 and has fully settled the purchase price and a Form 16 F has been issued to the intervener pursuant to s. 259(3) of the National Land Code (the NLC). The intervener is a purchaser in good faith. In such circumstances, the intervener's title over the land is therefore indefeasible under s. 340(3) of the NLC. The authority to support this proposition is to be found in the case of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133. Regarding *Adorna* case, Richard Malanjunn JCA (as His Lordship then was) in delivering the decision of the Court of Appeal in *Puspavathy* said:

> ... the 8th defendant premised her contention that the Certificate of Sale was an insufficient or void instrument for the transfer of ownership of the said land and relied on s. 340(2)(b) of the NLC. The decision of the Court of Appeal in *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 was cited as the correct judicial pronouncement on the point. Alternatively it was argued that the Federal Court decision in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 reversing the Court of Appeal should be ruled *ultra vires* as it failed to consider art. 13(1) of the Federal Constitution.
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> With respect we think the 8th defendant failed to appreciate that until and unless the Federal Court in another panel comes up with a different view on such issue or that the decision is invalidated by legislative mean the position of the law for now on indefeasibility should be as propounded by the Federal Court.

A Article 13(1) states:

(1) No person shall be deprived of property save in accordance with law.

We find no merit in the alternative argument advanced by the
B 8th defendant. The decision by the Federal Court in *Adorna Properties Sdn Bhd (supra)* is what the law is on the indefeasibility of title to land. Hence there is no question of deprivation of property not in accordance with law.

There is also merit in the submission by the 2nd intervener
C when he relied on s. 340(3) of NLC and as interpreted by the Federal Court in *Adorna Properties Sdn Bhd (supra)*. The Federal Court held that 'the proviso to sub-s (3) of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main
D provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of
E the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document ... even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to
F the said land.

Thus, being a purchaser in good faith and for valuable consideration having paid within the stipulated time the balance of the purchase price arising from the public auction sale, the 2nd intervener had acquired an indefeasible title or
G interest to the said land upon being registered as the registered proprietor.

[8] It is to be noted that *Muniandy Tamba Kaundan v. D & C Bank Bhd* [1966] 1 MLJ 374 and *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14 relied on by
H learned counsel for the defendant to support his argument that the order for sale should be set aside, were both decided before *Adorna*.

[9] Therefore, based on all the aforesaid reason, I would dismiss
I the defendant's application in encl. 70 with costs.